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James K. Gaynor

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The Military and the Law

*James K. Gaynor**

MILITARY LAW IS THE LAW which governs members of the Armed Services and, to some extent, the relations of other persons with the Armed Services.

Military law often is thought of as synonymous with court-martial, but that is not correct. The number of people who will be involved in a court-martial during a year—either as an accused, or as one having duties in connection with a court—likely will be less than two percent of any large military organization.

Members of the military service, however, are involved with military law every day in the year. It governs the way in which troops are trained, the Government property which is entrusted to one's care, and the compensation which is received at the end of each pay period.

There are three basic kinds of military law: Laws which have been enacted by the Congress, administrative regulations, and verbal orders of superior officers so long as they are not in contravention of law.

The military law of the United States enacted by the Congress is in title 10 of the United States Code, and in the appendix to title 50. In the official edition of the Code, there are 766 pages required for military law in title 10, yet only 42 of these pages are required for the Uniform Code of Military Justice, which contains the disciplinary provisions.¹

Among the many other things covered by enactments of the Congress are personnel, rank, enlistment, separation, and training, to mention only a few.

At one time, the Congress concerned itself with many details, and a century ago there were acts of Congress telling how many cooks were authorized an infantry company, how many laundresses could be employed by a regiment, and how many tins of tobacco were to be issued each month to a soldier in the field.

All of these matters eventually came to be proper subjects for service regulations, or administrative rules authorized by the Congress. These regulations have the force and effect of law. The Supreme Court of the United States so held in a case in 1942, and the case has never been overruled.²

* Dean, Cleveland-Marshall College of Law, Cleveland State Univ.; Colonel, U.S. Army Retired. [Note: The author served in a number of important Army legal assignments during his seventeen years as a judge advocate. This article, with slight revisions, is an address which he recently delivered to the Cadet Corps of John Carroll University.]

¹ §§ 801-940.

² *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

Each of the services issues its own regulations and, additionally, there are Department of Defense directives. We have had Army Regulations almost from the beginning of the Republic, but until the turn of the century, all of them could be published in one volume. Now they are issued in loose-leaf pamphlet form, and it would require almost a hundred feet of book shelving to hold all of them that are now in effect. Only the largest of military installations have all of them. The smaller organizations have only the regulations which pertain to them.

A few years ago, someone factitiously wrote an Army Regulation on how to tie the shoe lace, and it was published in a service journal. Of course regulations have not yet become that detailed, but it sometimes seems almost so.

While it is regulations with which one is mainly concerned in the service, elaboration here in greater detail might be confusing, so brief consideration will be given to some other facets of military law, and then our system of military justice will be briefly outlined.

International law and the law of war will be of concern to the one who is in combat with an armed enemy. Some people say that these types of law are illusory, for their only effect depends upon the strength to enforce them.

Until comparatively recent times in history, the law of war recognized very few rights of individuals. The winner took all, and the loser might well be enslaved or killed. That was the way it was done, and it certainly placed a heavy premium upon being on the winning side.

Recognized rules for the humane treatment of prisoners of war had their genesis in the American Civil War, and the first attempt to set them forth in writing was by famed General Order No. 100 issued in 1862. Since then, many nations of the world have entered into conventions—the four Geneva Conventions are the most important today³—but even so, we may find ourselves fighting an enemy like the Viet Cong, which of course has not ratified these conventions.

Today, we have a code of conduct for our people who are captured.⁴ A lot of people are wondering if it does not need re-evaluation in the light of recent events. Just what are the obligations of one who is captured? The fulfillment may depend upon the amount of courage which he possesses. But so long as we are the country that we are, we shall still be bound, when our forces capture enemy troops, to treat them in accordance with our international commitments.

There is still another kind of law, the law of martial rule, or martial law. To most people, it is onerous, for it is the rule of law which prevails when our civilian authorities cannot cope with a disorderly situation.

³ 6 U.S. Treaties 3316, 75 U.N. Treaty Series 135.

⁴ Originally issued as E.O. No. 10631, 20 Fed. Reg. 6057 (1955).

Troops may be called to assist the civilian authorities without the imposition of martial law. This is the situation where the civilian courts are able to function. But in case of complete chaos, martial law may be declared, and then many of our basic rights and freedoms are suspended for the common good.

Once martial law is declared, the military commander is supreme, but he nevertheless is not permitted to act without any restraint whatever. Martial law is temporary, and when the emergency is over, the military commander and his troops are personally responsible for actions taken in excess of those required by the situation as it reasonably should have appeared to them at the time.

Military government is something else again. That is the system of law set up by the victor in war, for the government of those liberated or conquered, until the civilian authorities are again able to take over.

Thousands of our young men are concerned with selective service, or the military draft, and this is a part of military law. However, this is a part which is entirely administered by the civilian authorities.

The only concern of the military forces is whether men are made available to them. How they are sent is a civilian function. Occasionally a person will allege that he was unlawfully inducted, or became a conscientious objector after entry into the service. In these cases, the military authorities must take some action, but these cases are relatively uncommon.

Each year, thousands of men are released from the military service before the normal time because they are unfit for the service. They may receive an honorable discharge, or a general discharge, or an undesirable discharge. These latter two are not punitive in nature, since they have not been adjudged by a court-martial. They are the result of action by a board of officers, so it is said that they are "boarded" out of the service.⁵

The cause may be a series of instances of misconduct, none of which is sufficient to justify a punitive discharge; or mental or physical unfitness; or conviction by a civilian court which seriously interrupts fulfillment of the military obligation; or it may be found that an individual entered the service fraudulently.

Perhaps a lot of the less-than-able soldiers are "bucking for a board" which is to say that they are trying to get themselves out of the service without a punitive discharge, but still with no concern for honorable service.

It usually is only after one has accomplished his purpose that he realizes that a less-than-honorable discharge is almost as onerous as one which is dishonorable or for bad conduct.

⁵ Board proceedings are covered by service regulations and there is some variation in procedures among the services but the statements made here generally summarize the manner in which board proceedings are conducted.

It may be observed that these board cases are not handled in a cavalier manner. The individual is entitled to counsel, he is entitled to present witnesses in his favor and to have those against him cross-examined, and he is entitled to an impartial review.

The decision of the board is not final. It must be approved by the commanding officer, but he cannot order a less-than-honorable discharge unless a board has recommended it.

Now we shall pass to military discipline, or that part of military law which deals with criminal offenses.

In the United States, all of the military forces are subject to one criminal code, the Uniform Code of Military Justice which became effective in 1951 and which was extensively amended in 1968.⁶ This code sets forth the types of conduct which may be punished by a court-martial, and just as in civilian life, if the conduct has not been made unlawful by the legislature, it is not punishable.

The code includes such crimes as murder, assault, and larceny, which are also unlawful in the civilian community.⁷ And it includes what are termed purely military offenses—such as unauthorized absence from duty, and disobedience of orders—which are offenses only because the person is a member of the service.

In civilian life, one may fail to report for work or disobey his employer's orders, and the most that can happen is the loss of his job. In the military service, this sort of conduct is criminal.

Until 1917, our courts-martial could try people only for purely military offenses, which are those directly connected with military duty. This is still the case in England and in France except when their troops are serving outside the country. In the Soviet Union, however, a court-martial may even try civilians for offenses connected with national security if some relation to the military is found.

Our courts-martial cannot try civilians except in time of war in an active theater of operations. Civilians accompanying the troops overseas could be tried by court-martial until a series of Supreme Court decisions between 1957 and 1960 forbade it.⁸ Our agreements with foreign governments by which our troops were sent overseas in time of peace were

⁶ The Military Justice Act of 1968 (P.L. 90-632, 82 Stat. 1335) extensively amended the Uniform Code of Military Justice and necessitated the publication of a revised edition of the Manual for Courts-Martial. The present edition is entitled *Manual for Courts-Martial, United States, 1968*. It is in loose-leaf form and almost doubles the bulk of the 1951 edition, which it replaced. The 1968 edition is available from the Government Printing Office at \$5.25 per copy without binding.

⁷ In a far-reaching decision announced on June 2, 1969 (*O'Callahan v. Parker*) the U.S. Supreme Court held that a court-martial is limited in its jurisdiction to offenses which are service-connected.

⁸ *Reid v. Covert*, 354 U.S. 1 (1957); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

made on the assumption that we could try our own civilians. Now, if a soldier takes his wife overseas and she gets into serious trouble, she is subject to trial in a foreign court.

It may be observed that in the United States, being a member of the service does not immunize one from trial by civilian courts⁹ and the military service may, for example, turn an alleged murderer over to the civilian courts for trial rather than trying him by court-martial.

In our country, the military forces run their own confinement facilities—stockades, or brigs as they are called in the Navy—and disciplinary barracks for the longer sentences to confinement. The question may be asked why a person should be punished by confinement. The usual answers, in civilian life, are to deter others, to rehabilitate the offender, or to get a dangerous person out of circulation for the public good. In the military service, there is an additional reason—the maintenance of discipline.

An armed force without discipline would have no military effectiveness. It would be no more than an armed mob, incapable of protecting the country.¹⁰ In the military life, there can be no democratic vote. It is a strict autocracy, and it cannot be anything less. But there also is a big difference from civilian life which is of benefit to the wrongdoer.

By far the largest number of offenses is not punished by court-martial and these infractions do not result in a conviction which lives with a man the rest of his life. All minor infractions are disposed of by nonjudicial punishment. This is provided by Article 15 of the Uniform Code.¹¹ It is sometimes called company punishment in the Army or captain's mast in the Navy.

For many years, a commanding officer was authorized to withhold privileges, or restrict to barracks for two weeks, or require extra duty for two weeks, or reduce an enlisted man in grade.

In 1962, the Congress increased these powers considerably, so that a man might be placed in what is known as correctional custody for up to thirty days, or lose up to half his pay for two months. The punishment can be suspended for a limited time.

Whereas one might have been tried by summary court-martial before 1962, and have had a conviction on his record permanently, at present he can be punished without this stigma. Of course he always has the right to demand trial by court-martial, but very few do.

There is nothing like this in civilian life. If one gets drunk and assaults someone, he may be sent to jail for a few days, or he might receive a suspended sentence, or he might only be fined. But there still is a conviction on his record that remains with him throughout his life.

⁹ *Peek v. United States*, 321 F.2d 934 (9th Cir., 1963).

¹⁰ *Fuller, C. J., in Carter v. McClaghry*, 183 U.S. 365, 390 (1902).

¹¹ 10 U.S.C. 815.

In some cases, nonjudicial punishment will not be appropriate because the offense is of such a serious nature. Then, as in civilian life, the criminal court is called to action, but in the military service it is called a court-martial.

There are three types of court-martial: summary, special, and general.¹² The summary court consists of one officer and the maximum sentence it can impose is confinement for thirty days, forfeiture of two-thirds pay for thirty days, and reduction in grade. It is somewhat like the justice of the peace court in many states except, of course, the military judge does not collect a part of the penalty as his fee.

The special court-martial, like the summary court, is one of limited jurisdiction. It consists of at least three members, and there is a prosecutor and the accused is entitled to a defense counsel. It is limited to a sentence not exceeding confinement for six months, forfeiture of two-thirds pay for six months, reduction in grade, and in some cases, a bad-conduct discharge. Certain safeguards have been provided, however, and one cannot be sentenced to a bad-conduct discharge by a special court-martial unless a qualified lawyer has been made available to defend him.

The general court-martial, like the Court of Common Pleas in Ohio, is a court of general jurisdiction. It can try any kind of a case and it can adjudge any sentence—including a death sentence—if the sentence is authorized by law for that particular offense.

The general court-martial consists of at least five members, there is an impartial military judge who rides circuit and has no responsibility to the military command in which the case is tried, and there are qualified lawyers as prosecutor and defense counsel.

Since 1951, an accused has been able to request that enlisted men sit as members of a general or special court, and if he makes such a request, then at least one-third of the members of the court must be enlisted.

Charges may be brought against a person by any member of the service. They must be sworn to, and then they are investigated. If the matter is serious enough for a general court-martial, there must be a formal pretrial investigation, similar to the grand-jury in civilian life. But in the military, an accused has a right to be represented by qualified counsel, to present witnesses in his behalf, and to have adverse witnesses cross-examined.

Trial procedure very much follows that which is used in civilian courts. The rules of evidence are the same, and a person is always presumed innocent until his guilt has been proved beyond reasonable doubt.

¹² All subsequent references to court-martial matters are as set forth in the Uniform Code of Military Justice, implemented by the Manual for Courts-Martial, United States, 1968.

In civilian life, after a person has been convicted, he may appeal, but this is not automatic. In the military, one review is automatic, and for the more serious offenses, there must be both a review and an automatic appeal.

No sentence can be effected until it has been approved by the commanding officer of the installation or major military organization, almost always a general. The commander may approve a sentence, reduce it, or disapprove the conviction, but he cannot in any way increase the punishment.

The summary court record must be approved by the commanding officer and it is then sent to a judge advocate who must examine it and see that it is legal in every respect. A judge advocate (in the Navy he is called a legal officer) is a qualified lawyer who is designated for the purpose. A judge advocate may, for example, find that the allegation did not state an offense, or that the sentence was excessive. The special court-martial record also must be approved by the commanding officer and then passed to a judge advocate or legal officer to examine for legal sufficiency.

There are many more safeguards in the general court-martial. First, the record must be thoroughly reviewed by the senior judge advocate or legal officer of the organization before the commanding officer takes his action. In this review, the judge advocate must analyze the evidence, and he must conduct a clemency investigation to see if there are any extenuating circumstances which would justify reduction of the sentence.

If the sentence includes a dishonorable discharge or confinement for one year or more, then it must go to Washington for an automatic appeal to the Court of Military Review.¹³ This court consists of at least three lawyers, officer or civilian, who are assigned to sit as a court and nothing else. The convicted person is furnished qualified appellate counsel to present his case for him.

Even if the sentence does not include a discharge or confinement, any conviction by general court-martial must be reviewed by a judge advocate in Washington.

Finally, if a conviction is upheld by the Court of Military Review, the accused still can petition the Court of Military Appeals. This is the supreme court in the military, and it consists of three civilian judges who are appointed by the President for fifteen-year terms and who have no responsibility to the military service.

Certain cases—such as any one involving a death sentence—*must* be reviewed by the Court of Military Appeals. In all other cases, it de-

¹³ Prior to the enactment of the Military Justice Act of 1968, this was known as the Board of Review.

pend upon whether the appellate counsel can convince the Court of Military Appeals that it should consider the case.

Meanwhile, throughout the process, the commanding officer of the convicted person is considering how soon the accused can be restored to duty. A soldier in the stockade is of no value to the service. The commander must give periodic consideration to him, for it is an adverse reflection upon a commander to have one of his men in confinement. In most commands, the immediate commander is required to visit any man in confinement at least once a week.

As a practical matter, it is seldom that a man given a sentence of six months will remain in the stockade for even half that period. He will be given another chance, and maybe another one after that, and if it finally looks as though he cannot be rehabilitated, he will be separated from the service, usually with a less than honorable discharge.

For the man who is sentenced to more than six months of confinement, the place of confinement usually will be the Disciplinary Barracks at Fort Leavenworth, Kansas. Even from there, a man can be restored to honorable service if he responds to the program of rehabilitation.

In summary, it may be concluded that the offender in the military service receives far more favorable treatment than does his brother in the civilian community who runs afoul of the law. It is not meant to infer that civilian justice is unfair—far from it—but from the foregoing discussion, one can see that in the military service, those who administer justice have very important motives for trying to rehabilitate the offender and return him to duty for another chance.